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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 151.

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

J. EDWARD WORTON
548 Pan American Bank Building
Miami 32, Florida

JOSEPH P. MANNERS
Industrial National Bank Building
Miami 32, Florida

W. G. WARD
1240 duPont Building
Miami, Florida

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida 32202

Attorneys for Petitioner.

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The Government is mistaken in assuming, if it does assume, that

> "Petitioner's basic claim must, therefore, be that jury commissioners are compelled by 28 U. S. C. 1861 to adopt a system which will inevitably produce an actual cross-section of the community."
>
> Brief in Opposition, p. 8.

Because this same misconception inheres in the opinion below (A. 27), we stated in the petition as clearly as we could that:

> "In this case, the complaint is not that the jury officials exercised their discretion badly but that they did not exercise it at all."
>
> Petition, p. 11.

The Government's Brief in Opposition again confronts us with the necessity of stating the issue "in the terms and

circumstances of the case." Rule 23(1)(c). The real issue —the question that the Court below decided in a way in conflict with applicable decisions of this and other courts— is simply whether section 1861 positively and affirmatively requires federal jury officials to exercise their own informed judgment in selecting the names of the requisite number of qualified citizens for inclusion in the jury box.

Petitioner does not contend (as the Government insists he does) that the jury officials purposefully adopted a system that was calculated to or did exclude women or Negroes because of considerations of sex or of color (Brief in Opposition, pp. 7-8). Neither does petitioner insist that jury officials may not rely principally or even exclusively on state voter registration lists when those lists have been found by the federal officials to provide a satisfactory index to the citizenry (Brief in Opposition, p. 7). Nor yet does petitioner contend that "the number of qualified jurors in the box fell below the statutory minimum" (Brief in Opposition, p. 10).

Rather, petitioner contends that the jury officials, ignoring the mandate of the Civil Rights Act of 1957 thereafter to choose prospective federal jurors without reference to state selection standards (71 Stat. 638, Title 28 U. S. C. §1861), continued thoughtlessly to follow a system that eliminates citizens who cannot qualify for state jury service; and that the jury officials, having in this manner collected a number of names, dumped those names by handfuls into the federal jury box without considering for a moment whether those persons were qualified for jury service under independent federal standards created by statute.

This Court declared in *Glasser* v. *United States*, 315 U. S. 60, 85, that:

> "Jurors in a federal court . . . are to be selected by the clerk of the court and a jury commissioner. Secs. 275, 276, Jud. Code, 28 U. S. C. secs. 411, 412, 28 U. S. C. A. ss 411, 412. This duty of selection may not be delegated."
>
> 315 U. S. at 85.

and, in *Ballard* v. *United States*, 329 U. S. 187, that this Court has a duty to "exercise our power of supervision over the administration of justice in the federal courts" when there is demonstrated "a departure from the scheme of jury selection which Congress adopted" (329 U. S. at 193) and "an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to [the defendant]" (329 U. S. at 195).

If it is still the law that the clerk and the jury commissioner are "the officials charged with choosing federal jurors" (*Glasser* v. *United States*, 315 U. S. at 86) and that those officials have the mandatory, positive and non-delegable duty to use their informed judgment in deciding the crucial questions

> *Which are the best available local sources from which may be gathered the names of prospective jurors?* and
> *Which among the citizens thus identified possess the statutory qualifications for federal jury service?*,

the writ should be granted, because the court below has held:

> "[T]he law as it now stands places the officials under no mandatory or positive commands; they are, on the contrary, controlled by one negative requirement: they may not discriminate, directly or indirectly."
>
> Opinion of Judge Whitehurst, 322 F. 2d at 205; A. 29.

Under the federal juror selection system, jury officials have a *duty* to discriminate. They have no function other than to discriminate against the unqualified. In recognition of that function, many judges and others interested in the administration of justice have bent their efforts to equip the jury officials to discriminate wisely. See, *e.g.*, *The Jury System in the Federal Courts* (*Report of the*

Judicial Conference Committee on the Operation of the Jury System), 26 F. R. D. 411. The only discriminating act of the jury officials in this case was to enforce a standard disapproved and abolished by Congress in 1957, and thus to eliminate as prospective jurors those unqualified to serve on Florida juries. Their failure to undertake to discriminate between the qualified and unqualified may not be justified on the ground that they at least did not discriminate unfairly—as against women for their sex or Negroes for their color (see the Government's Brief in Opposition, pp. 7-8).

If the jury officials had a nondelegable duty (*Glasser*, 315 U. S. at 85) to decide on a selection process that under local circumstances is suitable to effectuate federal policy, their default in discharging that duty should not be defended by attributing to them plausible but wholly ficticious reasons for undertaking certain conduct, then arguing that the officials had broad discretion and so could properly have decided to do what they did. Thus, these officials did not consult the voter registration lists after selecting those lists as the best index to the larger body of qualified citizens [as obviously was done by the jury officials in such cases as *Gorin* v. *United States* (1st Cir. 1963), 313 F. 2d 641, cited in the Brief in Opposition, p. 7]. Had such a decision been made in this case, presumably the jury officials would have selected the names of women as well as the names of men from the registration lists. But, by systematically excluding women's names in selecting from the registration lists and by limiting their consideration to those female electors who volunteered for state jury service, the jury officials arbitrarily excluded from consideration over ninety-nine per cent of the female electors in the selection area of Dade and Broward Counties.* Moreover, had the officials regarded

* Even if, as the Government speculates (Brief in Opposition, p. 7, n. 6, p. 10), all of the 2167 names of women which were taken from the lists of volunteers were placed in the federal jury box, those names comprised less than one per cent of the female electors (R. 218, 223) and only a fraction of one per cent of the adult females (R. 232-33) in the selection area.

the voter registration lists as providing the best access to a cross-section of the community, the officials would not now be selecting names "from city directories, without reference to their race or sex," as the Government represents they are doing (Brief in Opposition, p. 11). If as a matter of policy the jury officials had decided to lessen the burden on women by calling only those who volunteered for jury service—as was suggested by the Government in the Court of Appeals—they surely would not have required as a prerequisite to federal service that they first volunteer for state jury service (R. 239, 261).

We do not say that the law requires jury officials to use a "*particular* method in selecting jurors" (Brief in Opposition, p. 9; see also Opinion below, 322 F. 2d at 205). Instead, we insist that the officials must themselves select a method, having in mind the federal standards it is their duty to apply.

We have felt that the inattentiveness of the jury officials to their duty is symbolized by their conduct in alternatively dropping handfuls of names into the box (Petition, p. 14), in clear violation of section 1864 of Title 28. In the same way, the Government's argument on this point symbolizes the sort of justification that has been given at every step in this proceeding by United States officials charged with the administration of justice:

> "The statute was intended to assure only that both the commissioner and the clerk participate equally in the selection of a jury . . . and not that any particular formalistic act be performed by either or both."
>
> Brief in Opposition, pp. 10-11.

Since neither the clerk nor the commissioner undertook to select even one prospective juror as qualified under federal standards but left such selection to be "taken care of when they are qualified on voir dire" (R. 294), it is ironically true that the two officials did "participate equally in the selection." But equal disregard of the statutory scheme could hardly have been intended by Congress.

For the reasons stated in the petition, the writ should be issued.

Respectfully submitted,

J. Edward Worton
548 Pan American Bank Building
Miami 32, Florida

Joseph P. Manners
Industrial National Bank Building
Miami 32, Florida

W. G. Ward
1240 duPont Building
Miami, Florida

Chester Bedell
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorneys for Petitioner.